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## Legal Summaries

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# **Pepperdine University School of Law**

## **Legal Summaries**

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SUPREME COURT OF THE UNITED STATES

**Talk America, Inc. v. Michigan Bell Telephone Co.,**  
**131 S. Ct. 2254 (2011)**

*Synopsis:*

The Supreme Court reaffirmed the principle of giving deference to regulatory agencies when interpreting their own regulation, including interpretations in legal briefs. In doing so, the Court held that a telecommunications carrier must make its existing entrance facilities available to competitors at cost-based rates if the facilities are to be used for interconnection. The Court's reasoning is premised on the interpretation that the Federal Communication Commission ("FCC") had advanced regarding its own regulation, which the Court found reasonable, and as such, the interpretation was given deference.

*Facts and Analysis:*

*Talk America* addressed regulations passed under the Federal Communications Act of 1996 ("the 1996 Act"), a statute that required telecommunications companies to provide their competitors access to local exchange networks, such as the equipment used to receive, route, and deliver phone calls without making a profit.<sup>1</sup> The intent behind the Act was to increase competition by giving new companies access to existing networks, thereby allowing them to establish viable networks within the marketplace.<sup>2</sup>

By way of the 1996 Act, in 2005 the FCC passed the latest in a series of regulations addressing a company's obligation to provide "entrance facilities" at cost-based rates under what is known as the "interconnection" requirement, ensuring that a customer of a company could call that company's competitors, and vice-versa.<sup>3</sup>

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<sup>1</sup> *Talk America, Inc. v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2257-58 (2011).

<sup>2</sup> *Id.* at 2258.

<sup>3</sup> *Id.*

Thereafter, AT&T ceased to provides certain services to local providers at a cost-based rate.<sup>4</sup>

A number of local service providers complained to the Michigan Public Service Commission that AT&T was unlawfully abrogating their right to cost-based interconnection under the 1996 Act.<sup>5</sup> The commission agreed and ordered AT&T to continue providing entrance facilities for interconnection at cost-based rates.<sup>6</sup> AT&T then challenged the ruling in a federal district court, which ruled in AT&T's favor.<sup>7</sup> The Sixth Circuit affirmed, despite a FCC amicus brief arguing that their regulations did not change AT&T's obligations.<sup>8</sup>

Holding:

While the details of underlying regulation are complex and technical, the Supreme Court's reasoning is nothing if not clear. The Court held that lower courts must defer to an agency's interpretation of its own regulations, *including interpretations propounded in legal briefs*, unless the interpretation is “plainly erroneous or inconsistent with the regulation,” or there is any other “reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question.”<sup>9</sup>

The ruling reaffirms what is known as “*Auer* deference” from the Supreme Court’s decision in *Auer v. Robbins*.<sup>10</sup> Based on *Auer* and its progeny, the Court has repeatedly directed lower courts to “defer to an agency's interpretation of its own regulation, advanced in a legal brief, unless that interpretation is ‘plainly erroneous or inconsistent with the regulation.’”<sup>11</sup> Justice Scalia alone expressed criticism of the doctrine in his concurring opinion, stating “[i]t seems

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 2259.

<sup>6</sup> *Id.*

<sup>7</sup> Talk America, Inc., 131 S. Ct. at 2259-60.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 2261.

<sup>10</sup> See *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

<sup>11</sup> *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 881 (2011) (*quoting Auer*, 519 U.S. at 452).

contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.”<sup>12</sup>

**Astra USA, Inc. v. Santa Clara Cnty., 131 S. Ct. 1342 (2011)**

**Synopsis:**

The Court held that hospitals and community health centers have no right to sue drug manufacturers as third-party beneficiaries when the manufacturers violate an obligation made to federal agencies that requires drug companies to discount certain drugs. Permitting such private action would frustrate the regulatory regime that Congress created when it vested sole authority in a particular federal agency to oversee compliance.

**Facts and Analysis:**

Section 340B of the Public Health Services Act imposes a price ceiling on manufacturers when charging for medications sold to specified healthcare facilities.<sup>13</sup> The 340B program is administered by the Health Resources and Services Administration, a unit of the Department of Health and Human Services.<sup>14</sup> Drug manufacturers opt into the ceiling program by signing the Pharmaceutical Pricing Agreement, which permits them to participate in state Medicaid programs.<sup>15</sup>

Respondent Santa Clara County, operator of several health care facilities operating under the 340B program, filed suit against Astra and eight other pharmaceutical companies, alleging that they were overcharging in violation of the pricing agreement made under the 340B program.<sup>16</sup> Claiming to be the intended third-party beneficiary, the complaint sought compensatory damages for breach

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<sup>12</sup> *Talk America*, 131 S. Ct. at 2266 (Scalia J., concurring).

<sup>13</sup> 42 U.S.C. § 256(b).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Astra USA, Inc. v. Santa Clara Cnty.*, 131 S. Ct. 1342, 1347 (2011).

of contract.<sup>17</sup> All parties conceded that Congress authorized no private right of action under the 340B program.<sup>18</sup>

The district court judge dismissed the complaint, concluding that the 340B program and pricing agreement conferred no enforceable rights to health facilities under the auspices of the program.<sup>19</sup> The Ninth Circuit reversed, holding that while the respondents have no right to sue under the statute, they could nevertheless bring their suit against drug manufacturers as third-party beneficiaries of the pricing agreement.<sup>20</sup>

Holding:

The Supreme Court held that a private action to enforce the price agreement made under the 340B program is incompatible with the statutory regime, because Congress vested authority to supervise compliance with the program solely with the Department of Health and Human Services.<sup>21</sup> Respondents' argument maintaining that the price agreements are enforceable under a third-party beneficiary theory was rejected, as it overlooked the fact that the agreements simply restated a statutory obligation and documented the manufacturers' agreement to comply.<sup>22</sup>

Noting that the agreements had no negotiable terms, the Court reasoned that the pricing agreements are analogous to the Medicaid Rebate Agreements and are not traditional contracts.<sup>23</sup> A third-party suit to enforce an agreement between the Department of Health and Human Services and drug manufacturers, the Court concluded, is essentially a suit to enforce the statute itself, which all parties agreed Congress did not intend to permit.<sup>24</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 1349-50

<sup>22</sup> *Astra USA, Inc.* 131 S. Ct. at 1348.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

**Kasten v. Saint-Gobain Performance Plastics Corp.,**  
**131 S. Ct. 1325 (2011)**

*Synopsis:*

The Court interpreted a provision of The Fair Labor Standards Act (“FLSA”), in particular its prohibition of retaliation against workers for alleged violations of the Act, as encompassing both oral and written complaints made by those workers. While the meaning of text in isolation may suggest ambiguity with respect to the issue, the Court reasoned that given the purpose of the FLSA and the deference given to the interpretations provided by the pertinent regulatory agencies, only an interpretation that includes oral complaints is permissible.

*Facts and Analysis:*

Kevin Kasten brought a lawsuit against his former employer claiming a violation of the FLSA, because the employer located its time clocks in an area that prevented workers from receiving credit for the time they spent putting on and taking off their work clothes.<sup>25</sup> A federal district court judge ruled in Kasten’s favor.<sup>26</sup>

Subsequently, Kasten sued his former employer for unlawful retaliation under the FLSA, claiming the employer fired him after he orally complained about the location of the time clock.<sup>27</sup> The employer disagreed, arguing Kasten was terminated because he repeatedly failed to check in, even after being warned. The Court, for present purposes only, accepted Kasten’s facts as true.

The district court granted summary judgment to the employer against Kasten because it found that the FLSA does not provide protection for oral complaints.<sup>28</sup> The Seventh Circuit agreed that the FLSA’s antiretaliation provision does not protect oral complaints.<sup>29</sup>

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<sup>25</sup> Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1329 (2011).

<sup>26</sup> *Id.* at 1329-30.

<sup>27</sup> *Id.* at 1330.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

The Court granted certiorari in light of a split among the circuits on the issue.<sup>30</sup>

Holding:

The Supreme Court disagreed with the Seventh Circuit, vacating and remanding the case, because the Court found that the scope of the statutory phrase “filed any complaint” includes oral, as well as written, complaints.<sup>31</sup> In isolation, the Court reasoned that the text could be understood as to not provide a conclusive answer as to whether the term encompasses both oral and written complaints.<sup>32</sup> However, the Court reasoned further that “interpretation of this phrase ‘depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.’”<sup>33</sup> As such, the Court held that only an interpretation that includes oral complaints is permissible.<sup>34</sup>

The decision took into account that, in addition to dictionary definitions, state statutes and federal regulations contemplate oral filings.<sup>35</sup> In addition, it was found that contemporaneous judicial usage showed that oral filings were a known phenomenon at the time of the FLSA's passage.<sup>36</sup> Moreover, where “file” may imply a more restrictive reading, the addition of “any complaint” suggests a broader interpretation that would include an oral complaint.<sup>37</sup> Thus, the Court concluded that the statutory text “might, or might not, encompass oral complaints.”<sup>38</sup>

Notwithstanding the ambiguity found on the surface of the text, the Court found that “[s]everal functional considerations indicate that Congress intended the antiretaliation provision to cover

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<sup>30</sup> *Id.*

<sup>31</sup> Kasten, 131 S. Ct. at 1336.

<sup>32</sup> *Id.* at 1330.

<sup>33</sup> *Id.* (quoting *Dolan v. Postal Service*, 546 U.S. 481, 486 (2006)).

<sup>34</sup> Kasten, 131 S. Ct. at 1330.

<sup>35</sup> *Id.* at 1330-32.

<sup>36</sup> *Id.* at 1332.

<sup>37</sup> *Id.* at 1333.

<sup>38</sup> *Id.*



oral, as well as written, ‘complaint[s].’”<sup>39</sup> The Court reasoned that limiting the interpretation to written complaints would undermine the FLSA’s basic objective because the FLSA relies on information received by employees for enforcement.<sup>40</sup> Moreover, the Secretary of Labor has consistently held the view that “filed any complaint” covers both oral and written complaints, and given the delegation of enforcement powers to federal administrative agencies, this view should be given a degree of weight, as it is reasonable and consistent with the FLSA.<sup>41</sup>

In his dissent, Justice Scalia disagreed with the majority, interpreting that the FLSA provision in question does not include *any* form of complaint made to the employer.<sup>42</sup> The plain meaning of the statutory language, the dissent argues, “contemplates an official grievance filed with a court or an agency, not oral complaints—or even formal, written complaints—from an employee to an employer.”<sup>43</sup> Finding the phrase to be “clear in light of its context,” the dissent saw no reason to “rely on abstractions of congressional purpose.”<sup>44</sup>

### **UNITED STATES COURTS OF APPEAL**

#### **Dearth v. Holder, 641 F. 3d 499 (D.C. Cir. 2011)**

##### **Synopsis:**

A citizen of the United States residing in Canada brought an action seeking declaratory and injunctive relief for a Second Amendment violation. The complaint alleged that a statute, along with its implementing regulations, made it impossible for a United States citizen who lived outside the country to lawfully purchase a firearm in the United States. The Court of Appeals for the D.C. Circuit reversed a lower court dismissal based on lack of standing,

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<sup>39</sup> *Id.*

<sup>40</sup> *Kasten*, 131 S. Ct. at 1333-35.

<sup>41</sup> *Id.* at 1335-36.

<sup>42</sup> *Id.* at 1336-37.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 1339.

because the injury was ongoing and the allegations pled constituted a sufficiently real and immediate injury.

*Facts and Analysis:*

Stephen Dearth and the Second Amendment Foundation sought declaratory and injunctive relief, claiming that provisions of 18 U.S.C. § 922 and the corresponding regulations were unconstitutional because they prevented Dearth from purchasing a firearm.<sup>45</sup> The federal district court dismissed the suit for lack of standing.<sup>46</sup>

The complaint challenged 18 U.S.C. §§ 922(a)(9) and (b)(3) and implementing regulations promulgated by the Bureau of Alcohol, Tobacco, Firearms and Explosives (“BATF”).<sup>47</sup> Dearth argued that the rules made it impossible for a United States citizen who lived outside the United States to lawfully purchase a firearm in the United States. Specifically, section 922(a)(9) makes it unlawful for “any person . . . who does not reside in any State to receive any firearms unless such receipt is for lawful sporting purposes.”<sup>48</sup>

Dearth, an American citizen, resides in Canada and no longer maintains a residence in the United States.<sup>49</sup> In 2006 and 2007, Dearth twice attempted to purchase a firearm in the United States.<sup>50</sup> He failed on both occasions, since he could not complete Form 4473, required by the BATF before purchase, as question thirteen asks for the purchaser’s state of residence.<sup>51</sup> Because Dearth was unable to provide this information, the transaction could not be completed.<sup>52</sup> Dearth intends to purchase a firearm and store it with relatives in Ohio.<sup>53</sup>

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<sup>45</sup> Dearth v. Holder, 641 F.3d 499, 500 (D.C. Cir. 2011).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 500-01.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 501.

<sup>50</sup> *Id.*

<sup>51</sup> Dearth, 641 F.3d at 501.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

*Holding:*

The D.C. Circuit reversed the lower court's finding that Dearth had no standing to challenge the laws and regulations that prevented him from lawfully purchasing a gun in the United States.<sup>54</sup> Given the government's denial of Dearth's past applications to buy a gun and his persisting intent to regularly return to the United States, the court reasoned that Dearth faces a present and continuing injury that is sufficiently real and immediate, thus entitling him to the standing necessary to challenge the law.<sup>55</sup>

The court rejected the government's argument that it had not affirmatively denied Dearth's application, finding that the government had erected a scheme that precluded Dearth from completing the required application.<sup>56</sup> In addition, the court found that Dearth is experiencing adverse effects, because he intends to travel to the United States soon.<sup>57</sup> As such, Dearth claimed a present cognizable injury, whereby the federal scheme continues to frustrate his plan to purchase a firearm.<sup>58</sup>

**Prometheus Radio Project v. FCC, 652 F.3d 431 (3d Cir. 2011)***Synopsis:*

The Third Circuit considered, for the second time after a 2004 remand, recent revisions to rules promulgated by the Federal Communications Commission ("FCC"). While approving most of the new regulations, the court vacated the rule relaxing limits on cross-ownership of newspapers and broadcast outlets, because the FCC failed to provide adequate notice required under the Administrative Procedure Act ("APA"). In addition, certain provisions concerned with diversity were remanded in order to give the FCC an opportunity to justify or modify its approach to advancing broadcast ownership among minorities and women.

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<sup>54</sup> *Id.* at 503.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 502.

<sup>57</sup> Dearth, 641 F.3d at 502-03.

<sup>58</sup> *Id.*

Facts and Analysis:

In 2002, the FCC issued a Notice of Proposed Rulemaking, announcing that it would review a number of rules in its 2002 Biennial Regulatory Review, which was followed by a corresponding order in 2003 modifying these rules.<sup>59</sup> In *Prometheus Radio Project v. FCC*, the Third Circuit concluded that the FCC failed to properly consider proposals to promote minority broadcast ownership and failed to provide reasoned analysis for the rules significantly relaxing cross-ownership of media out, for example, ending the complete ban on newspaper and broadcast cross-ownership.<sup>60</sup>

In 2007, the FCC developed a new set of rules culminating in the 2008 Order.<sup>61</sup> While still pursuing a policy favoring relaxation of the restrictions on cross-ownership, the specific 2003 rule was discarded in favor of a policy in which the FCC would consider newspaper or broadcast cross-ownership proposals on a case-by-case basis using a four-factor test.<sup>62</sup> At the same time, the FCC adopted the Diversity Order, which utilizes a number of policies to increase ownership opportunities for “eligible entities,” defined as all entities that qualify as small businesses under the standards of the Small Business Administration.<sup>63</sup>

In response to the 2008 Order, a number of parties filed a Petition for Reconsideration, and subsequently filed for a review of the order with the Third Circuit, which consolidated the cases, so as to again consider the FCC’s news rules.<sup>64</sup>

Holding:

The court affirmed most of the FCC’s new rules in the 2008 Order.<sup>65</sup> However, the cross-ownership rule was found to be

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<sup>59</sup> *Prometheus Radio Project v. FCC*, 652 F.3d 431, 438 (3d Cir. 2011).

<sup>60</sup> *Id.* at 438-40.

<sup>61</sup> *Id.* at 441.

<sup>62</sup> *Id.* at 441-42.

<sup>63</sup> *Id.* at 442-43.

<sup>64</sup> *Id.* at 443-45.

<sup>65</sup> *Prometheus Radio Project*, 652 F.3d at 472.

promulgated in manner that violated the APA's notice requirement.<sup>66</sup> Furthermore, provisions of the Diversity Order were remanded, because the court found the definition of "eligible entities" to be unsatisfactory.<sup>67</sup>

The APA requires agencies to provide notice of proposed rulemaking that contains "either the terms or substance of the proposed rule or description of the subjects and issues involved."<sup>68</sup> Once notice is given, "the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation."<sup>69</sup> The court found this provision to require "enough time with enough information to comment and for the agency to consider and respond to the comments."<sup>70</sup> Finding the two sentences in the FCC's Further Notice of Proposed Rulemaking document to be "simply too general and open-ended to have fairly apprised the public of the Commission's new approach to cross-ownership," the Third Circuit vacated and remanded the new cross-ownership rule expecting the FCC to comply with the APA.<sup>71</sup>

The dissent found that that notice and opportunity to comment given by the FCC concerning to the new cross-ownership to be adequate under the APA.<sup>72</sup> Petitioners, the dissent argued, should have been made aware of the cross-ownership rule because of a string of recent notifications made by the FCC.<sup>73</sup> The new rule should have been anticipated as being the final course, in light of the initial notice, because it was a logical outgrowth.<sup>74</sup>

Concerning the Diversity Order, the court found the definition of "eligible entity" proscribed therein "lacks a sufficient analytical connection to the primary issue that Order intended to address."<sup>75</sup> Because the FCC failed to show connection between the definition

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 448; 5 U.S.C. § 553(b).

<sup>69</sup> *Prometheus Radio Project*, 652 F.3d at 448; 5 U.S.C. § 553(c).

<sup>70</sup> *Prometheus Radio Project*, 652 F.3d at 450.

<sup>71</sup> *Id.* at 453-454.

<sup>72</sup> *Id.* at 473.

<sup>73</sup> *Id.* at 474.

<sup>74</sup> *Id.* at 475.

<sup>75</sup> *Id.* at 471.

and the goal adopted in the rule, the definition was found “arbitrary and capricious.”<sup>76</sup> The goal was to promote broadcast ownership by minorities and women, and the court found that FCC had not “gathered the information required to address these challenges.”<sup>77</sup> As such, the Third Circuit vacated and remanded the provisions within the Diversity Order implicated by the “eligible entity” definition, and directed the FCC to justify or modify its approach to advancing broadcast ownership by minorities and women.<sup>78</sup>

**Veterans for Common Sense v. Shinseki, 644 F.3d 845  
(9th Cir. 2011)**

**Synopsis:**

Two nonprofit organizations representing the interest of veterans brought a suit against the Department of Veterans Affairs (“VA”) seeking injunctive and declaratory relief, alleging that the administrative processing of the claims of injured veterans are subject to chronic delay so severe as to constitute violations of the veterans’ statutory and constitutional rights. In an emotional and consequential 2-1 decision, the Ninth Circuit largely agreed with the veterans organizations. Lambasting the political branches for failing to fulfill the obligation owed to veterans, the opinion ordered the VA to undertake “system-wide” changes including, among other things, the implementation of various VA mental health care initiatives.

**Facts and Analysis:**

Of the 25 million veterans in the United States, roughly one-quarter are enrolled in the VA’s healthcare program.<sup>79</sup> Veterans have a statutory right to receive hospital care and other medical services under 38 U.S.C. § 1710. In addition, the VA is required to provide readjustment counseling and related mental health care services to

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<sup>76</sup> Prometheus Radio Project, 652 F.3d at 471.

<sup>77</sup> *Id.* at 472.

<sup>78</sup> *Id.*

<sup>79</sup> Veterans for Common Sense v. Shinseki, 644 F.3d 845, 852 (9th Cir. 2011).

eligible veterans.<sup>80</sup> Moreover, the Veterans Claims Assistance Act, 38 U.S.C. § 5103, states that agencies under the VA have a “duty to assist” veterans, requiring veterans be given aid in developing all evidence in support of their disability claims.<sup>81</sup>

Currently, veterans experience long delays in the consideration and adjudication of service-connected death and disability claims, particularly when such claims are appealed.<sup>82</sup> Many veterans suffering from serious disabilities, including post-traumatic stress disorder (“PTSD”), suffer substantial and severe adverse consequences as a result of this lengthy delay.<sup>83</sup> In just the six months between October 2007 and April 2008, at least 1,467 veterans died during the pendency of their appeals.<sup>84</sup>

Veterans for Common Sense and Veterans United for Truth filed a complaint in federal district court seeking declaratory and injunctive relief on behalf of themselves, their members, and a putative class composed of all veterans with PTSD who are eligible for or who receive VA medical services, and veteran applicants for and recipients of service-connected death or disability compensation benefits based upon PTSD.<sup>85</sup> In the complaint, numerous statutory and constitutional challenges were made to the administrative practices that the VA uses for health care services and adjudication of benefits claims.<sup>86</sup> The district court found the claimed delays to be significant, determining that the “the health and welfare of veterans is at stake.” Nevertheless, the lower court concluded that the remedies sought in the complaint were beyond its power, as they would require a complete overhaul of the VA system, “something clearly outside of this Court’s jurisdiction.”<sup>87</sup>

### Holding:

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 856.

<sup>82</sup> *Id.* at 859.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 860.

<sup>85</sup> Veterans for Common Sense, 644 F.3d at 860.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 864.

As a threshold matter, the court held that the VA could not rely on sovereign immunity for the purposes of the present controversy, because Congress expressly waived such immunity.<sup>88</sup> Reversing the lower court, the panel found the complaint, in requesting “relief other than money damages,” satisfied the federal law waiving sovereign immunity.<sup>89</sup>

The Ninth Circuit went on to find that the lack of adequate procedures to protect against needless suffering among veterans because of severe delays in their mental health care violates the Due Process Clause of the Fifth Amendment.<sup>90</sup> Federal law has created an entitlement to healthcare for eligible veterans, where is therefore a statutorily created property interest, and the chronic delay of has ripened into a deprivation of a legally protected right, based on the absence of review procedures.<sup>91</sup> The court remanded with instructions to determine what additional procedures or other actions would remedy the existing due process violations.<sup>92</sup>

From here, the panel moved to the claim invoking statutory rights, where it described the shortcoming of the VA as involving “critical benefits to sustain those incapacitated by mental disability, delayed for an excessive period of time without satisfactory explanation.”<sup>93</sup> Here, the court found that the Administrative Procedure Act precludes any possibly of obtaining the requested relief.<sup>94</sup>

The Ninth Circuit concluded that “[t]he United States Constitution confers upon veterans and their surviving relatives a right to the effective provision of mental health care and to the just and timely adjudication of their claims for health care and service-connected death and disability benefits.”<sup>95</sup> Though leaving most of the details of the ordered changes to be worked out by the lower

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<sup>88</sup> *Id.* at 865.

<sup>89</sup> *Id.* at 866-67.

<sup>90</sup> *Id.* at 870-77.

<sup>91</sup> Veterans for Common Sense, 644 F.3d at 876.

<sup>92</sup> *Id.* at 877-788.

<sup>93</sup> *Id.* at 887-788

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 890.



court on remand, with instruction to have evidentiary hearings on the matter, the Ninth Circuit recommended more procedural protections for the claims processes, including “maximum time periods for determinations at various stages of the claims adjudication process and/or the need for a procedure to expedite claims where emergency circumstances are shown to exist,” and suggested alternative dispute resolution techniques, citing the Supreme Court’s mandate for non-adversarial administration of veterans’ benefits in *Walters v. National Ass’n of Radiation Survivors*, 473 U.S. 305 (1985).<sup>96</sup>

In a dissent that did not fail to match the majority’s sense of urgency, Chief Judge Kozinski stated that “[t]he majority tramples over the strict jurisdictional limits Congress has imposed on our ability to review the VA’s decisions on veterans’ benefits.”<sup>97</sup> The dissent accuses the majority of “hijack[ing] the [VA’s] mental health treatment and disability compensation programs and install[ing] a district judge as reluctant commandant-in-chief.”<sup>98</sup>

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<sup>96</sup> *Id.* at 887-88,

<sup>97</sup> Veterans for Common Sense, 644 F.3d at 890 (Kozinski, C.J., dissenting).

<sup>98</sup> *Id.*